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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW HERBERT MOONEY, Defendant and Appellant.	A152776 (Solano County Super. Ct. No. FCR327403)

Defendant Andrew Herbert Mooney was convicted by a jury of several sex crimes. On appeal, defendant claims the prosecution improperly invited the jury to infer his guilt from his failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*). He also argues the trial court abused its discretion when it denied him probation based on the results of his STATIC-99R test. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with two counts of oral copulation with a person under the age of 16 (former Pen. Code,[1] § 288a, subd. (b)(2), now § 287, subd. (b)(2), counts 1 and 2), one count of sexual penetration by foreign object of a person under the age of 16 (§ 289, subd. (i), count 3), and one count of lewd acts upon a child (§ 288, subd. (c)(1), count 4). The following is a summary of the relevant trial evidence.

[1] All further statutory references are to the Penal Code.

The victim testified that she began talking to defendant online through a social media application and website in the beginning of October 2015, less than a month short of her fourteenth birthday. When the victim created her social media profile, she set it up to indicate that she was 18 years old, but next to her profile name she specified "I'm actually 14." Defendant initiated their first conversation, during which defendant and the victim discussed meeting in person to engage in sex acts. Defendant told the victim he was nervous because he had never met anyone off-line and would be doing things with a minor.

In late October 2015, defendant and the victim met in person for the first time in a church parking lot. While in defendant's car, the two talked. Some of the things they talked about was the age difference between them, how defendant did not believe she was only 14, and how the victim was in high school. They had talked about the victim's true age on a messaging application prior to meeting as well. Officer Torres eventually interrupted their conversation after seeing the car in the parking lot, because it was 10:30 p.m. and the church was closed. The victim told Officer Torres she was 17 years old and her birthday was in a few days, and defendant said he was 24 years old. Officer Torres testified he warned defendant that the victim was 17 years old, and lectured defendant about how it was not a good idea for him to hang out with a minor. Officer Torres then took the victim home to her grandmother's house and learned from the victim's grandmother that she was only 13 years old.

The victim testified that despite the way their first meeting ended, she and defendant continued to communicate and the two agreed to meet on October 31, after the victim finished trick-or-treating. This final meeting occurred after the victim's fourteenth birthday passed. Defendant picked the victim up from her grandmother's house, even while expressing concern about the police appearing. Defendant took the victim to an abandoned house, suggested they get into the backseat of his car, and upon doing so they engaged in various sex acts. About two days later, the victim disclosed the incident to

her therapist. The victim's therapist told the victim's father, who alerted the authorities. Officer Stuart Tan testified the victim reported that defendant was aware she was 14 years old at the time they engaged in sexual activity.

Defendant did not testify at trial. The defense did call Officer Torres who testified, among other things, that he was shocked when he learned the victim was actually 13 years old, as he had expected her to be a little younger than 17 years old, maybe 15 or 16 years old.

DISCUSSION

A. Alleged *Griffin* Error

Defendant's claim of *Griffin* error arises from the prosecutor's rebuttal to defense counsel's closing argument.

In his closing argument, the prosecutor asserted, among other things, that the first three counts required proof beyond a reasonable doubt that the defendant did not reasonably and actually believe the victim was over the age of 18. The prosecutor argued that the evidence presented at trial, including various pieces of circumstantial evidence, satisfied that burden. During closing argument, defense counsel argued that the prosecutor failed to carry his burden and the evidence showed defendant reasonably and actually believed the victim had just turned 18 years old before they engaged in sexual activity. Notably, during her argument, defense counsel emphasized a jury instruction concerning defendant's constitutional right not to testify, which instructed the jury not to consider that defendant did not testify for any reason.

During his rebuttal, the prosecutor again addressed whether defendant reasonably and actually believed the victim was at least 18, asserting: "Is there one piece of evidence that she's—the defendant believed that she was 17 on October 1st? Absolutely not. There is not one piece, not one shred of evidence that you heard come from the witness stand, or in the exhibits, that would bolster the defense argument that he believed she was 17."

Defendant argues the foregoing portion of the prosecutor's rebuttal argument violated *Griffin*. Defendant, however, failed to properly object and thus forfeited the claim. (*People v. Turner* (2004) 34 Cal.4th 406, 421.) There is an exception to the rule of forfeiture where "a timely objection would have been futile or ineffective to cure the harm." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007.) Defendant attempts to invoke this exception by contending that the prosecutor's argument—even though only briefly calling the jury's attention to the absence of defendant's testimony—was so damaging that no admonition could have cured it. This is unpersuasive. Nothing in the record suggests an objection by defense counsel followed immediately by an admonition to the jury would not have cured any prejudice. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1336 (*Seumanu*) ["[A]bsent some indication to the contrary, we assume a jury will abide by a trial court's admonitions and instructions"].)

Even if not forfeited, defendant's present claim of *Griffin* error is without merit. *Griffin* held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (*Griffin, supra*, 380 U.S. at p. 615.) " ' "[A] prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand." [Citation.]' [Citation.] Where it is 'reasonably probable' that the prosecutor's comments misled the jury 'into drawing an improper inference regarding defendant's silence,' the remarks will be deemed to constitute *Griffin* error. [Citations.] However, 'the rule prohibiting comment on defendant's silence does not extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses.' " (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1020–1021.)

Defendant claims that only he could have provided evidence about what he believed the victim's age to be, therefore the prosecutor's comment violated *Griffin*. We

are not convinced. It has long been recognized that "[m]ental state . . . [is] rarely susceptible of direct proof and must therefore be proven circumstantially." (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) Here, the prosecution's evidence concerning defendant's belief regarding the victim's age was largely circumstantial. It is apparent that evidence of what defendant believed or did not believe could have been proven in ways other than defendant's own testimony.

Indeed, defense counsel specifically argued circumstantial evidence showed that defendant thought the victim was at least 18 years old when they had sex. Immediately after the prosecutor made the alleged improper argument during her rebuttal, she identified specific pieces of circumstantial evidence concerning defendant's beliefs about the victim's age. Viewed in context, the prosecutor's argument was a fair comment on the state of the evidence. (See, e.g., *People v. Mitcham* (1992) 1 Cal.4th 1027, 1049–1051; *People v. Hughes* (2002) 27 Cal.4th 287, 374; *People v. Font* (1995) 35 Cal.App.4th 50, 56.)

Defendant's reliance on *People v. Vargas* (1973) 9 Cal.3d 470 (*Vargas*) is misplaced as that case is distinguishable. In *Vargas*, the court found *Griffin* error where the prosecutor argued the defendants had not *denied* they were at the scene of the crime. (9 Cal.3d at p. 474.) *Vargas* explained: "the word 'denial' connotes a personal response by the accused himself. Any witness could 'explain' the facts, but only defendant himself could 'deny' his presence at the crime scene." (*Id.* at p. 476.) In contrast with *Vargas*, the argument challenged here did not involve use of the word "deny."

Finally, we note the indirect and brief nature of the portion of the argument at issue (*People v. Thompson* (2016) 1 Cal.5th 1043, 1118), as well as the fact that the jury was instructed not to consider defendant's failure to testify for any reason, an instruction defense counsel explicitly emphasized during closing argument. (*Seumanu*, *supra*, 61 Cal.4th at p. 1336.) Considering these circumstances, as well as the strength of the evidence of defendant's guilt, we have no trouble concluding that any *Griffin* error

flowing from the prosecutor's comment was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

B. Denial of Probation

Defendant next contends the trial court abused its discretion by relying solely on the STATIC-99R results to deny probation because it is generally an unreliable test. Defendant, however, did not object on the ground raised here, forfeiting the issue on appeal. (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1100; *People v. Wagoner* (1979) 89 Cal.App.3d 605, 616.) Even if we were to reach the merits, defendant fails to carry the heavy burden of showing the trial court abused its discretion. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909–910; *People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) Defendant identifies nothing in the record casting doubt on the general reliability of STATIC-99R test results. (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 725.) Notably, the probation report supports the reliability of the test, stating among other things that many studies "have proven its predictive accuracy is in the moderate to high range."

Defendant asserts a commitment under the Sexually Violent Predator Act cannot be based solely on STATIC-99 predictive results, but it is unclear why that has any bearing on this probation denial. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Finally, defendant cites *People v. Therrian* (2003) 113 Cal.App.4th 609 (*Therrian*) "for the proposition that the Static-99 test is unscientific and cannot be relied on exclusively to support a finding that a defendant is a risk to re-offend." Not so. *Therrian* involved re-commitment proceedings under the Sexually Violent Predator Act, and held the test in *Kelly*[2] did not apply "when an expert's opinion regarding the likelihood of defendant reoffending is not based solely upon the results of a Static-99 test (which

[2] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*).

assigns a risk assessment of reoffending)." (*Therrian*, at p. 611; *id.* at p. 614 ["*Kelly* applies to unproven techniques or procedures that appear 'in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury' "].) Even if one were to interpret dicta in *Therrian* as a criticism of the reliability of the predictive value of the STATIC-99 test, *Therrian* alone would still not assist defendant as the record indicates the STATIC-99 test has been revised since *Therrian* was decided.

DISPOSITION

The judgment is affirmed.

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Fujisaki, J.

We concur:

_____
Siggins, P.J.

_____
Wiseman, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.